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THE INTERNATIONAL RELATIONS BETWEEN THE UNITED STATES AND CANADA— AN HISTORICAL SKETCH

BY

(and with Compliments of)

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(This address, delivered at the Conference of the American Society for Judicial Settlement of International Disputes, at Washington, December 15-17, will also appear in the printed proceedings of the Conference.)

The position of Canadians is in some respects a little singular. Associated as we are, united with the mother country, the British Empire, by ties of loyal sentiment,—a silver cord which, please God, will never be broken,—politically we belong to the British Empire. Socially, commercially, financially, we in large measure belong to the continent of which we form a part. * * * A Canadian necessarily, by reason of his position, is inclined to look with a great deal of interest, and sometimes with no little anxiety, upon his international relations with the larger, more populous and wealthy and stronger nation on the South. A nation of eight millions by the side of a nation of one hundred millions must needs look with anxiety upon anything which might induce armed conflict; and be pleased and gratified at any movement or arrangement which may remove from probability or possibility indeed, anything in the nature of physical force.

The Reciprocity Treaty of 1854 was terminated in 1866 by the United States with almost the avowed

object of forcing Canada to renounce her allegiance to the British Crown upon penalty of being ruined commercially and financially. But much water has flowed under the bridge since then and the *status quo* as to nationality is accepted by all as satisfactory. We are no longer suspicious of the United States. The people of the United States are now content to let us work out our own destiny, standing by our side, holding up with us an example of freedom, liberty and right; and they are willing that there shall be two great English-speaking nations upon this continent, and not, as was expected at one time, only the one. This I say because history so speaks. * * * During the latter part of the Eighteenth Century and earlier, Canada was a matter always of anxiety, a source of anticipated peril, to the English colonies; and when the time came in 1759 to wrest that land from the French, the colonies gladly contributed their quota of men. Massachusetts furnished 7,000 men, nearly one-sixth of all her men capable of bearing arms. Connecticut turned out five thousand men. New Jersey, then as now, ambitious and active, although she had lost one thousand of her sons very shortly before, contributed another thousand; and the two battalions of Royal Americans were not the least effective of the warriors in Wolfe's Army. They succeeded. Quebec fell, and what Vergennes, the French Ambassador, had prophesied and what, indeed, had been foreseen by some few thoughtful Englishmen and more Frenchmen took place. The pressure of French Canada on the English colonies was removed; the latter had opportunity and leisure to consider their

relations with the mother country: and the result is history.

I have no time and no desire to enter into the long tale of that fratricidal strife between the insular British and their brethren on this continent, that long story of mismanagement, blundering, misunderstanding and folly; although that story is also full of deeds of self-sacrifice and noble valor. But Canada was not forgotten. It was understood and believed on all hands, as any one can read in the history of the Continental Congress, that the union of the English-speaking colonies would not be complete without Canada being taken in also. It was moreover recognized that Canada, remaining out of the Federation, would form the base of attack; and Britain would pour fresh troops in from that quarter. The freedom and repose of the colonies could, it was thought, never be secure with Canada in hostile hands on their border. The fact was heralded that Sir Guy Carleton, Governor of Canada, had not been wholly successful in reconciling the French "habitant" to British rule. The feudal aristocracy had gone, the fungoid growth of *noblesse* had been removed in 1763, but the "habitant" had been left behind under the British flag. Sir Guy Carleton had done his best and had, at least, in part, as was supposed, failed. General Schuyler was sent north that he should occupy Canada and induce her to become a part of the American Union. General Schuyler fell sick, and the ill-fated Montgomery succeeded him. He led his forces without much opposition to the frowning cliffs of old Quebec where he fell. * * * Not satisfied to rely upon military

persuasion alone, your people tried the printing press also. Benjamin Franklin, Charles Carroll of Carrollton and Samuel Chase were sent to Montreal, then in the hands of General Wooster and the American forces; and they took with them a French printer named Mesplets, picked up in Philadelphia. The printing press proved as futile as the musket. * * * Well, I am not going into the story of the repulse at Quebec, of the battles which took place, of the suffering of the American forces and of the bravery upon both sides. That war, which never should have begun, came to an end. The war between the two parties, the English people on this side the Atlantic and upon the other, came to an end; and then the race showed their common sense. If there is anything upon which an English-speaking individual prides himself, it is common sense. The common sense of the people, and their desire to be governed by law, showed itself in Jay's treaty of 1794, the first treaty after the initial treaty of 1783. By it, practically all matters in dispute between the nations were to be left to arbitration. Since that time until the treaty of 1909, which was (except in form) made between the United States and Canada, nearly all matters in dispute between the two peoples have been disposed of by arbitration, or by being left to some person to deal as a judge with the questions in dispute.

In the Definitive Treaty of Peace, concluded September 3, 1783, it was provided that the middle of the River St. Croix should at a certain place be the boundary line between the territories. Moreover, the starting point was to be determined by the source of

the St. Croix. Doubts arose as to the river meant, and in the Treaty of Amity, Commerce and Navigation, concluded November 9, 1784 (Jay's Treaty, the starting point of international arbitration) it was by Article V provided that the determination of the question as to what river was meant in the Treaty of Peace by the "River St. Croix" should be decided by three commissioners, one appointed by each country, these two to appoint the third. The commissioners were to give the latitude and longitude, of the source, and to describe the river. By a subsequent Treaty of March 15, 1798, these commissioners were relieved from particularizing the latitude and longitude of the source, but they were still to describe the river, and as soon as they determined the source, a monument was to be erected to prevent any uncertainty. The Treaty of 1794 also provided by Article IV for a joint survey for the purpose of ascertaining whether the Mississippi extends so far northward as to be intersected by a line to be drawn due west from the Lake of the Woods, the contracting parties agreeing that if not, they would regulate the boundary at that point by amicable negotiation.

And Article VI provided for a Board of Commissioners, five in number, two appointed by each party and the fifth by the unanimous voice of these four. These commissioners were to decide the amount of losses and damages actually suffered by British subjects by lawful impediments since the Peace, whereby the British subjects being creditors of citizens or inhabitants of the United States, could not by ordinary course of justice obtain full and adequate compensation. The commissioners were given power to ex-

amine on oath or affirmation; in short, the general powers of a court; and the award of any three was made final—the United States agreeing to pay the amount which might be awarded.

Difficulties arose in the execution of this Article, and on January 2, 1802, a new Treaty was concluded, by which His Majesty agreed to accept £600,000 Sterling, payable by three annual instalments of £200,000 each, in full of these claims.

So, too, citizens of the United States had complained of irregular capture and condemnations of their ships. A board of five commissioners, appointed in "exactly the manner directed with respect to those mentioned in the preceding Article," was provided for by Article VII—the award of any three was made final—and Britain agreed to pay the amount determined. Commissioners were duly appointed, and they are referred to in the Treaty of January 8, 1802, in Article III.

It is, I think, perfectly plain that already both countries fully recognized the value of the judicial determination of international disputes even then.

But the fighting blood still coursed the veins of both peoples—the *argumentum ad baculinum* was appealed to again. A still more inexcusable war even than that of forty years before—if such a thing is possible—broke out. Canada was again invaded, this time in the west as well as in the east. Upper Canada was in great part populated by the United Empire Loyalists and their descendants. The United Empire Loyalists had left their native land rather than change their flag and their allegiance, and in many instances had lost all they had. Although by Article V of the Treaty of Peace

it had been agreed that Congress should earnestly recommend it to the legislatures of the respective States to provide for the restitution of all confiscated estates belonging to British subjects, and should also earnestly recommend to the legislatures a reconsideration of all statutes in the premises, so as to make them consistent not only with justice and equity, but also the spirit of conciliation which should in the return of the blessings of peace universally prevail, few of the despoiled Loyalists received much benefit from the recommendation—on one pretext or another they were left without compensation for their confiscated property. The mother country came to the rescue and paid some of them a part of what they should have received from their former neighbors.

It was no wonder then that the bitterest feeling existed against the nation to the South on the part of these martyrs for principle and their descendants. Not only did they consider the invaders disloyal and rebels against their legitimate Sovereign, but also guilty of the meanest kind of fraud—embezzling by process of law.

But at length, this armed conflict came to an end, and again there was peace. On December 24, 1814, at the end of the war, a new Treaty, the Treaty of Ghent, was entered into; and common sense again prevailed.

In the Treaty of Peace of 1783 the boundary between the two countries had been fixed in such a way that it was doubtful whether the Grand Manan and the islands in the Bay of Passamaquoddy, belonged to the one country or the other. Accordingly in the Treaty of Ghent, Article IV made provision for refer-

ence to two commissioners to examine and decide upon the several claims, one to be appointed by the King and the other by the President. If these should not agree, it was provided that it should be referred to some friendly Sovereign or State, each contracting party agreeing to consider the decision of such friendly Sovereign or State final and conclusive.

The two commissioners appointed under this Treaty, in 1817, November 24, gave a decision awarding three islands in the Bay of Passamaquoddy to the United States and the rest of the islands in that bay as well as the Grand Manan to Britain, i. e. Nova Scotia.

It was stated in this award that, "It became necessary that each commissioner should yield a part of his individual opinion."

Precisely similar provisions were made by Article V of the Treaty of Ghent for the determination of boundaries at other points (the North of Maine) as were made in Article IV for the islands, and by Article VI for the boundary at the Iroquois River and Lakes Ontario, Erie and Huron, and the determination of the ownership of the islands.

The commissioners under Article V of the Treaty of Ghent were to cause the boundary from the source of the River St. Croix to the River Iroquois or Cataraquai to be surveyed and they were to make a map of the boundary determined by them. The commissioners appointed had elaborate, voluminous and complicated reports made, with surveys, etc., but failed to agree. Accordingly September 29th, 1837, a convention was entered into to refer the matter to some

friendly Sovereign or State; but the award, rendered by the arbitrator, the King of the Netherlands (1831) was satisfactory to neither party and was set aside by mutual waiver. The dispute was finally settled by the Ashburton-Webster Treaty (1842.)

The commissioners under Article VI of the Treaty of Ghent, Messrs. Porter and Barclay, gave a decision at Utica, N. Y., June 18, 1822, which was accompanied by a series of maps; and the line so decided by them has been ever since respected.

During the War of 1812 much damage had been done by armed vessels upon the Great Lakes. The Treaty of Ghent did not provide that such armed forces should not be kept up; but it became apparent to both sides that it would be well strictly to limit the number and quality of armed vessels upon the fresh waters between the two countries. After some negotiation notes were interchanged April 28 and 29, 1817, containing the "Rush-Bagot convention," which notes contained an agreement by one and the other party limiting the naval force to be kept on the lakes to a very few: on Lake Ontario one vessel, on the Upper Lakes two vessels, on Lake Champlain one vessel, none of the vessels to exceed one hundred tons burthen, and each to have but one cannon of 18 pounds. It was agreed to dismantle forthwith all other armed vessels on the Lakes, and that no other vessels of war should be there built or armed; six months' notice to be given by either party of desire of annulling the stipulation.

The arrangement was after some delay submitted by the President to the Senate, and that body in 1818 approved of and consented to it.

Differences had arisen in the meantime as to the true meaning of Article I of the Treaty of Ghent, which had provided for the immediate restoration of all possessions taken by either party from the other during the war. The United States claimed the restitution of or full compensation for the slaves in any territory which was to be restored to the United States under the treaty but was still occupied by the British Forces, whether the slaves were on shore or on board any British vessel in the territory of the United States. Britain had disputed this claim.

By a convention concluded at London, October 20, 1818, it was by Article V provided that the determination of this difference should be referred to some friendly Sovereign or State to be named for that purpose, and each of the contracting parties engaged to accept such decision as final and conclusive.

The Emperor of Russia was named. He gave his decision that the United States were entitled to compensation for all slaves carried away by the British forces on leaving the territories which were to be restored, and all slaves transferred to British vessels within these territories (provided such slaves were from the territories), but not for slaves carried away from territories not to be restored to the United States.

Rights given by Article I of the Treaty of 1818 to the inhabitants of the United States to fish became the subject of much controversy, very unpleasant and even dangerous in its character. The troubles were at length put an end to in 1910 by an arbitration by the Hague Permanent Court. This will be spoken of later.

To carry out and make effective the decision of the Emperor of Russia, a convention was concluded July

22, 1822, under the mediation of the Emperor of Russia, whereby (Article I) one commissioner and one arbitrator were to be appointed by the President, and one commissioner and one arbitrator by the King, who were to constitute a board to determine (if the governments had not in the meantime agreed) the true value of slaves at the time of the exchange of the ratification of the Treaty of Ghent and so fix an average value; if the majority should not agree the Russian minister or agent at Washington was to determine the average value.

Article II provided that, the average value being found, the two commissioners were to form a board to determine the number of slaves to be paid for, and they were given powers of examining under oath, etc. If they did not agree on any point, the name of one of the arbitrators was to be drawn by lot, and that arbitrator became the third member of the board, the decision of the majority to be final.

Difficulties arose in the execution of this convention, and ultimately November 13, 1826, the two countries agreed that $1,204,960 should be paid and accepted in full, and the commission was dissolved.

Claims continued to be made by the citizens of each country against the other and another convention became necessary. This was concluded February 8, 1853, and provided (Article I) for the reference to two commissioners, one to be named by the Queen and the other by the President, of all claims presented against either government by citizens of the other country. The commissioners were to name a third person to act as arbitrator or umpire in any case in which they should differ in opinion. If they could not

agree upon the umpire, each was to name one and the choice between the two so named was to be made by lot. The time for making the award was July 17, 1854, extended to January 15, 1855.

The commissioners selected as umpire Mr. Joshua Bates, who resided in England, but was an American. They awarded damages in about thirty claims; and the whole proceedings of the board were completely satisfactory to both countries.

June 5, 1854, a new Treaty was entered into—the Reciprocity Treaty—which, by Article I, provided for the appointment by each party of a commissioner. These were to choose or select by lot a third person as arbitrator or umpire, if necessary. The commissioners were to examine the coasts of the British Provinces and the United States, and designate the places reserved exclusively for British fishermen and excluded from the common liberty of fishing given by the convention of October 20, 1818, and the Treaty we are now considering.

I pass over the Treaty for the Suppression of the African Slave Trade, April 7, 1862, and the mixed court provided for by that Treaty to pass upon claims for arbitrary and illegal detention of vessels by the ships of either navy.

An additional convention was concluded June 3, 1870, whereby these courts were abolished for any future business, and their jurisdiction lodged in the courts of the two countries.

By a Treaty of July 1, 1863 (Article I) commissioners were to be appointed, one by each government, they to select an arbitrator or umpire. If they could not agree the King of Italy was to be appointed. They

were to pass upon the money compensation to be paid to the Hudson's Bay Company and the Puget's Sound Agricultural Company in respect of rights and claims in Oregon and Washington Territories. The commissioners, A. S. Johnson and John Rose, made their award September 10, 1869, allowing $450,000 to the Hudson's Bay Company and $200,000 to the Puget's Sound Agricultural Company.

Then came the very important Treaty of Washington May 8, 1871—important *inter alia* from the fact that for the first time one of the plenipotentiaries was from Canada, namely, the Prime Minister of Canada—and still more so from the fact that the provisions as to the rights given to citizens of the United States of coast fishing and through bonding were not to come into force until legislation had been passed to that intent by the Parliament of Canada and the Legislature of Prince Edward Island (then still a separate Province and not as yet a part of the Dominion of Canada.) There was a long and acrimonious debate in the Parliament of Canada over the proposed legislation, but at length the Act was passed, June 14, 1872, 35 Vic. (Dom.) C. 2.

The importance to be attached to these facts is, I think, obvious. It is true that Canada was not recognized as a nation with power to make her own treaties, but the mother land acknowledged her very great interest in the matters to be considered by appointing her Prime Minister one of the Imperial Plenipotentiaries. Further than that the home authorities recognized that she was "mistress in her own house," and that her own Parliament should determine what was best for her. This was a kind of official recognition

of the real position of Canada, concealed as it was by official and traditional terminology.

Article I provides for the disposal of the "Alabama Claims" by "Tribunal" of five arbitrators, one named by each of the two governments, parties to the dispute, one by the King of Italy, one by the Emperor of Brazil and one by the President of the Swiss Republic. They were to meet in Geneva. They did so, and their award is too well known to require further statement.

By Article XII an agreement was made to submit to three commissioners all claims of citizens of the United States other than those arising from the acts of ships allowed by Britain to escape from her ports and similar claims by British subjects against the United States. One commissioner was to be appointed by each contracting party and if the parties could not agree upon the third, the Spanish Representative at Washington was to name him. This board sat at Washington. The claims on the part of the United States arose from the St. Alban's Raid, and other alleged wrongs. The total number of cases filed on both sides was nearly 500 and the decisions were in most instances unanimous.

Article XXII provided for three commissioners to determine the amount of compensation to be paid by the Government of the United States to the British Government for the privileges given the citizens of the United States of sea coast fishing. Each party was to appoint one, the two governments jointly the third and if they could not agree on the umpire, the Austrian representative at London was to nominate him. This was the well-known Halifax Arbitration.

Article XXXIV is another provision which requires notice. The Treaty of June 15, 1846, made the international boundary at the far West, "The middle of the channel which separates the Continent from Vancouver Island." The commissioners appointed to determine the boundary differed as to the position of this channel. It was agreed by Article XXXIV to leave the determination of this controversy to the Emperor of Germany. The Emperor (October 21, 1872) decided in favor of the American contention; and we lost a large island which we had thought was ours. In 1873, March 10, the commissioners, Hamilton Fish, Sir Edward Thornton and James C. Prevost, made a final disposition of the whole boundary under the Treaty of 1842.

Seal fishery gave rise to a good deal of trouble, and after considerable negotiation and a *modus vivendi,* a Treaty was signed at Washington, February 29, 1892, which provided for the determination of the matters in controversy by a tribunal of seven arbitrators, two to be named by each of the two powers to the treaty, one each by the King of Sweden and Norway, the King of Italy and the President of France. The agent of Britain was the Canadian Minister of Marine and Fisheries, and one of the counsel was a leader of the Toronto bar, while one of the arbitrators was the Canadian Minister of Justice, afterward Prime Minister of Canada. The award was made August 15, 1893, and not long afterward the United States paid $425,000 in full of all claims by British subjects. The matters at issue involved the exclusive rights in the seal fisheries in Bering's Sea, and the jurisdiction of the United States over its waters. The dispute was full of potentialities for war and at any time an inju-

dicious act on the part of officers distant from and without communication with their government might have had disastrous results.

Troubles had also arisen in reference to the boundary line between Canada and Seward's purchase from Russia, Alaska. On July 22, 1892, a convention was concluded for joint surveys; but still there were difficulties which could not be solved by surveyors. After much negotiation a convention was concluded January 24, 1903, whereby the determination of the boundary line was referred to a tribunal of six impartial jurists of repute, three to be named by each contracting party.

Three Americans of eminence were appointed by the United States and the British Government appointed the Lord Chief Justice of England and two Canadians, one of whom had been Chief Justice of Ontario and was a Justice of the Supreme Court of Canada, the other a Chief Justice of Quebec. Upon the death of Mr. Justice Armour, Mr. A. B. Aylesworth, K. C., of the Toronto bar, was appointed in his stead.

This Tribunal met in London in 1903 and their award is of too recent date to require explanation. It is to be noticed, however, that Canadian counsel sustained the burden of the labor of preparation and argument of the case.

On January 11, 1897, there was signed at Washington the Olney-Pauncefote Treaty, providing for the reference to three arbitrators of all claims or aggregates of claims not amounting to £100,000 and not involving territorial claims. These arbitrators were to be appointed one by each government and the two thus selected to nominate the third—all three to be jurists of repute. All claims or aggregates of claims exceed-

ing £10,000 and all other matters in difference under Treaty or otherwise, not including territorial claims, were agreed to be left to the board and if the board were unanimous, the award was to be final; if not, either party could have it reviewed by a tribunal of five jurists of repute, two appointed by each government and the fifth by these four, or, if they could not agree, then by the King of Sweden or Norway or some substitute selected by the contracting parties. This Treaty failed of ratification by the Senate.

In 1908, April 4, a general Treaty of Arbitration between the United States and Great Britain was signed at Washington. This provided (Article I) that differences which might arise of a legal nature or relating to the interpretation of treaties existing between the two contracting parties, and which could not be settled by diplomacy, should be referred to the permanent Court of Arbitration established at the Hague by the convention of July 29, 1899, provided they did not affect the vital interests, the independence or the honor of the two contracting States and did not concern the interests of third parties.

Article II provides that in each individual case the parties were to conclude a special agreement defining the matter in dispute, the scope of the powers of the arbitrators and the times to be set for the several stages of the procedure.

A provision of very great significance to a Canadian appears in the Treaty. The British Government reserved the right before concluding a special agreement in any matter affecting the interests of a self-governing Dominion of the British Empire to obtain the concurrence therein of the Government of that Dominion.

This was not indeed the first time the concurrence of the colony had been provided for; as we have seen that in the Treaty of Washington (1871) certain parts of the Treaty were not to come into force until legislation had been passed by the colonies concerned.

It was in conformity with the provisions of this Treaty that the special agreement was entered into, with the concurrence of the governments of Canada and Newfoundland, for submission to the Hague Permanent Court of Arbitration of questions relating to fisheries of the North Atlantic Coast. The questions arose under the convention of 1818 which gave (Article I) certain rights to the inhabitants of the United States to fish in British waters. This special agreement, signed at Washington January 27, 1909, confirmed by interchange of notes March 4, 1909, set out the matters in dispute and the contentions of either party.

The board appointed contained the Chief Justice of Canada and a Justice of the United States Circuit Court of Appeals, as well as an Austrian, a Dutchman and an Argentine. Canadian counsel again took part in the presentation of the case for Great Britain and assumed much of the burden of its preparation.

The result seems to have been satisfactory to both sides.

Now, while I do not say at all that I have made an accurate division of the various treaties, this, broadly, is the result: Of matters which were peculiarly pecuniary, there were five submitted. Two were wholly successful and three were not successful. Of matters which were not solely pecuniary, involving land or something of that kind, ten were submitted to commissioners, of which eight were wholly successful

and two not successful. There were four references to sovereigns, three of which were successful. Therefore, of the nineteen references, thirteen were wholly successful and only six have failed, which I venture to say is an admirable showing.

January 11, 1909, a Treaty—"Waterways Treaty"—was signed providing for the establishment and maintenance of an International Joint Commission of the United States and Canada—three appointed by each government—which commission should (Article VIII) have jurisdiction over and pass upon all cases involving the use, obstruction or diversion of the waters between the United States and Canada. But Article IX contains an agreement that all matters of difference between the countries involving the rights, obligations or interests of either in relation to the other or to the inhabitants of the other along the frontier shall be referred to this commission for inquiry and report. Article X provides that any questions or matters of difference involving the rights, obligations or interests of the United States or of Canada, either in relation to each other or to their respective inhabitants may be referred for decision to this International Joint Commission. If the commission be equally divided, an umpire is to be chosen in the manner provided by Act 45 of the Hague convention of October 18, 1907. This may be called a miniature Hague tribunal of our own just for us English-speaking nations of the Continent of North America.

Leaving aside questions of tariff, which are quite outside the subject of this paper, the international relations between the two countries are governed by the three agreements:

1. The Rush-Bagot arrangement.
2. The General Arbitration Treaty of 1908.
3. The Waterways Treaty of 1909.

The first of these has been strictly observed, except where the consent of Canada has been obtained to trifling variations from its terms—a variation more in the letter than in the spirit.

The understanding was, however, in great danger in 1864. The Minister of the United States in London was instructed in October of that year to give the six months' notice required to terminate the agreement; and Mr. Adams did so, with the subsequent approval of Congress. Before the lapse of the time specified, however, matters on the lakes had taken a different turn, and the United States expressed a desire that the arrangement should continue and be observed by both parties. This was acceded to and all parties thereafter considered the convention to be in full force.

In 1904 permission was given to the United States ship Essex, carrying fourteen guns, to pass through the St. Lawrence River and the Canadian Canals to the Great Lakes from the Atlantic. This was done on the assumption that the United States did not intend to depart from the convention, although I confess my inability to understand how this was logically consistent. But we are not a logical people.

The Fern was allowed to pass in the same way in 1905 through the canals, and she is still in the lakes. Her use is agreed to be confined to purposes of training.

In 1907 the State of Michigan asked for the loan from the United States of a ship. The Don Juan d'Austria was loaned; her guns and armament were

removed at Portsmouth for the voyage up, and though no pledge was given that they would not be replaced, the ship was, at the request of the United States, allowed to pass up the Canadian Canals.

In the same year the Sandoval, carrying a secondary battery of two guns, was upon a like request allowed to pass for the use of the New York Naval Militia. This permission is expressed to be "on the same conditions as those governing the similar cases of the United States vessels Hawk and Dorothea, i. e., that the said vessel shall pass through Canadian waters without armament and that her use will be confined to purposes of training.

In 1908 the U. S. S. Nashville received the like permission on the like terms.

The Navy Department of the United States claims that there is nothing in the way of treaty obligations to prevent the building of any kind of vessel on the Great Lakes, and there are a dozen shipyards with plant and organization sufficient to build hulls and machinery and to launch naval vessels of the maximum size that can be taken by the canal system.

Canada has no such ships as those which I have mentioned; and it cannot be denied that sometimes there are anxious thoughts entertained arising from the maintenance on the lakes of these ships, though only for training purposes. The garrison at Toronto is maintained chiefly for training purposes for our militia; but it would be just as efficient were war to be declared as though it were not used for training purposes. But when all is said and done, most Canadians realize that the United States is a friendly nation; and, even with the variations allowed, the arrange-

ment has been of enormous advantage to all concerned, of disadvantage to none.

It may be well for the United States to consider whether it is not unwise to ask that the letter of the agreement should be departed from. Canada would be considered ungracious were she to refuse to consent to other ships being allowed to pass up the canals for use on the lakes. It would look as though she feared a hostile movement on the part of her neighbor; that she doubted the good faith and real desire for permanent peace of her elder sister to the South. But both parties thought that the agreement was one that should be made and when made should be observed; and it is rather hard to see how the convenience of one party should lead to its being departed from. National susceptibilities are to be considered, however absurd they may be and whether they are absurd or not.

The Treaty of 1908, already referred to, provides that differences which may arise of a legal nature, or relating to the interpretation of treaties existing between the two contracting parties, and which it may not have been possible to settle by diplomacy, shall be referred to the Permanent Court of Arbitration established at The Hague by the convention of July 29, 1899, provided nevertheless that the differences do not affect the vital interests, the independence or the honor of the two contracting States, and do not concern the interests of third parties.

The Treaty of 1909 was preceded by the constitution of a board of commissioners. Such a board was formed at the request of the President, acting under the authority of the River and Harbor Act approved June 13, 1902. The functions of the proposed board

were defined in the Act and were substantially a full investigation of the question of the boundary waters; and the board was to consist of six members, three appointed by the United States and three by Canada. The President, July 15, 1902, communicated through the American Ambassador at London with the British Government, that government transmitted the invitation to the government at Ottawa, the Canadian Government accepted the invitation, and this acceptance was communicated to the American Government. The American part of the board was appointed in 1903 and the Canadian in 1903 and 1905; and work was begun with all convenient speed on the Sault Ste Marie Channel, the Chicago Canal, the Minnesota Canal, etc. This board has done an immense amount of very valuable work already.

The Treaty of 1909 was really at the instance of that board. It provides for an International Joint Commission, three appointed by the United States, three by Canada; and the value of the work which may be done by this new commission in incalculable.

Every dispute involving the rights, obligations or interests of the United States or of the Dominion of Canada either in relation to each other or to their respective inhabitants may be referred to the commission by the consent of the two countries.

It is hard to see how a more comprehensive clause could be framed; and if the Treaty had provided that such dispute "shall" be referred, the work would be perfect. As it is, the Dominion must give consent through the Dominion Cabinet. That is an easy task. We have a government which is united—it must be united or it could not stand—and which in this instance

does not need to go to Parliament for authority. But in the United States the action must be by and with the advice and consent of the Senate; and sometimes it is said trouble arises in the Senate about confirming treaties.

Each reference to the commission will or may be but equivalent to making a new treaty. Had the provision been that the consent should be given by the President of the United States, the position of the consenting parties on the two sides would have been much alike.

Better even than this would be a provision making the arbitration of the commission apply automatically. If such a provision proved unsatisfactory, the treaty could be denounced and a new treaty negotiated. But I suppose there may be some jealousy on the part of the Senate, or perhaps the Constitution prevents. And we Canadians notice that your Constitution prevents a great many things over which we have no trouble at all.

Now arbitration has on the whole worked satisfactorily. The worst result by arbitration is enormously better than the best obtained by war. Of course it is the inalienable right of every litigant freeman, in case he does not succeed, to say things about the judge. And no doubt the judge has been damned most energetically in many instances. That is human nature. One of your humorists has said "There is a great deal of human nature in man." That is true, and neither American or Canadian has got rid of its frailties. *"Naturam expellas furca tamen usque recurret."*

Indeed the very negotiating of his treaty, which is perhaps his proudest memorial, ruined Jay politically

and cost him the Presidency. Republics are proverbially ungrateful. The Republic failed at the time to appreciate the value of the Chief Justice's services; but posterity has done him justice and he is recognized by all as one of the ablest, noblest and most patriotic men of his own and all time.

We Canadians have always thought Lord Ashburton gave away a large amount of territory to Maine which rightfully belonged to Canada; but this was not the act of an arbitrator or referee. When the German Emperor took from us the Island of Juan de Fuca, we said things about the Judge, but not much; and all irritation on the northwest corner of the United States has long passed away. The Alabama award did not much concern us, and when the Halifax award was made it was the turn of the United States to damn the judge; and no one can say that the opportunity was not fully utilized. But you paid up—with a wry face and after long delay, it is true—but you paid up.

The Paris arbitration was, I think, fairly satisfactory to both sides; and except with a few fire-eaters on both sides of the line, and the politicians who made use of it in the endeavor to dish their opponents, there was no public objection.

The case was different in the Alaska arbitration. Canadians almost to a man believed that Canada did not get justice. Even before the arbitrators sat, there were statements made that some or one of the American arbitrators had expressed a fixed determination not to give way, no matter what the evidence. It was felt that the decision was not a judicial decision on the merits, but that the result was based upon diplomatic grounds. Our people were not so angry at the de-

cision itself; but they thought fair play had not been shown. All this may, of course, be quite without foundation or justification; and certainly little, if any, reference is now made to the matter among us. In any event, most of the anger was vented upon the head of Lord Alverstone; and I presume he did not feel it much.

But once again I say, the worst result (consistent with honor) by arbitration is enormously better than the best by war. * * * Man is a social animal, and so soon as, in the course of evolution, he became such, it was imperative that his conduct should be restrained by rule of some kind; in short, by law. Obedience to law must needs be considered right; disobedience wrong, a sin, for wrong and sin were at first all one.

If a man conceived his rights to have been trenched upon, only two courses were open. If the force of public opinion (and no civilized man can wholly appreciate the tremendous power of public opinion in a primitive community) should not prove effective to restore him to his rights or to bring about adequate compensation, he might be obliged to avenge his wrongs, if he could, by his own strong right hand. This is anarchy.

The other method is the submission of the determination and enforcement of rights to some tribunal; and that tribunal, under whatever name it may be known, is in substance a court.

A court is organized and sustained to enforce the law. The law is composed of such rules of conduct as the community think it worth while to endeavor to

compel obedience to; whether these rules of conduct come down from the forefathers or are laid down by contemporary authority. The law is made effective by various sanctions, so that the violator shall pay in "meal or malt," in person or pocket.

The course of evolution has been gradually to eliminate from the determination of disputes the power of the disputants, their physical prowess, and finally their influence and social standing. Ultimately, in all free countries, all men are free and equal before the law; no longer is the wager of battle allowed, and no baron can now overawe the court. So all civilized societies have long had courts to declare and insure his rights for everybody.

But while the State considered it wholly necessary that disputes between citizens should be decided by some judicial tribunal and not by the strong hand, the same principle has not been fully adopted in cases of disputes between nations. International law has laid down rules indeed, but these rules might be disregarded at will; the only penalty being the unfavorable public opinion of the world. This public opinion never had the force of the public opinion of a primitive community.

Whether by evolution upward or devolution downward, I shall leave to theologians and scientists to determine, when man first appeared as man he was little removed from the brute. When anyone differed from him, his only means of argument was the means of argument provided for the brute, from whom he was little differentiated; the argument of force, improved by the use of a weapon, a club. So the only way to determine the right of man or woman was

through the use of brute force, and this was extended to the case of the rights of family, sept, clan, city, nation. The God of Battles was the final arbiter, and man believed, as nine out of ten unenlightened men still believe, that war was a necessity. True, in disputes within the bosom of a nation, means have been found to dispose of controversy without a physical encounter; the exertions of counsel take the place of the exertions of litigant or champion; but between nations the case is different. * * * The Supreme Court of the United States has been for more than one hundred years dealing with disputes between sovereign States; the Supreme Court of Canada and the Judicial Committee of the Privy Council at Westminster for a shorter period. These States are not indeed sovereign in the sense that they can declare war against each other; nor, what is equally war of a kind, can they levy imposts upon interstate commerce. But in many a case these courts have determined matters of as great importance as are usually determined by war. It is not necessary in this place to mention any of the decisions of your Supreme Court. It may be of interest, however, to mention one in Canada.

In 1876 the Dominion of Canada by statute (39 Vic. C. 21) set apart and formed a new territory, Keewatin, beginning at the western boundary of Ontario and extending west to the eastern boundary of Manitoba; and placed this new territory under the jurisdiction of the Parliament of Manitoba. Unfortunately, the westerly boundary of the Province of Ontario was a matter of dispute, the Dominion claiming that the line was much further east than the Province put it. At

once there arose a dispute between the Province of Manitoba and the Province of Ontario; and actually each province, Ontario and Manitoba, had an armed force in the disputed territory, and it looked as though two armies, each commanded by officers bearing the patent and warrant of the same Queen, would come to open war in that territory. Better counsels prevailed, however. Arbitration failed, and it was ultimately left to the Judicial Committee of the Privy Council, the highest court of appeal in the British Empire. That is an instance of a British court dealing with a matter of territory.

Why cannot, then, practically all disputes between nations be determined in the same way by a judicial body? Of course, there are, or rather may be, questions affecting the honor of a State. No man and no State can, it is supposed, allow another to judge of his or its honor. Now, I do not suggest that there should be an international court to decide whether a nation must fight in order to be considered honorable, as in the German army there are courts of honor to decide whether a man shall fight; but in most instances, if not in all, there is doubt of the facts, and the facts being determined, there is seldom any difficulty in deciding whether a nation should fight. Why should not the facts be determined by an impartial tribunal?

We have a law in Canada that employees must not strike or employers lock out, unless and until an arbitration has been had into the merits of the controversy. After the arbitration, the men or the masters may decline to accept the award, and strike or lock out. But the arbitration brings out the facts; and the

instance is rare in which an award is not accepted, with modifications, it may be, agreed upon by both parties.

If nations would submit the facts to an impartial tribunal, the occasions for war would be reduced indefinitely.

The independence of a State, of course, cannot be arbitrated upon; but a war to destroy independence is in this age absolutely unthinkable.

The main objection to a general and absolute treaty of arbitration lies in the want of an authoritative code of laws governing States, as the municipal laws of a State govern its citizens. That objection is rapidly disappearing. Through the labors of international lawyers, a fair body of international law has already been elaborated, which has received the implied assent of civilized powers. Would it be too much to hope that the Hague Conference or the Permanent Court of Arbitration may be able to draw up a complete code of law by which all nations would consent to be bound? Or is it too much to hope that the body of gentlemen who have been appointed by my friend Mr. Carnegie recently—I dare to call him my friend Mr. Carnegie, because, although I never shook him by the hand until tonight, I insist upon being allowed to call every friend of peace, my friend—is it too much to ask of these gentlemen, who are envied by every judge in the land, that they shall have a code of international law drawn up, which will be binding—for it would be binding—upon the nations?

A beginning was made in this direction in the Washington Treaty of 1871, in which the contracting parties agreed, by Article VI, upon the duties of a neutral

government so far as it was necessary for the purposes of the arbitration at Geneva. It might well be that the most carefully drawn code would be found not to cover certain matters. The *casus omissus* is always coming up in ordinary litigation. What harm could result from allowing the board to supply any *casus omissus?*

Now, Mr. President, ladies and gentlemen, before I sit down I wish to say one thing more.

It may be a mere coincidence—if so, it is a happy coincidence—that the last letter I received before leaving Toronto to attend this meeting was from the president and secretary of the Centenary Celebration Association which has been formed in the Province of Ontario, urging me most earnestly to attend a meeting of that organization. Here, amongst other things, is what they say:

"The promoters of this centenary celebration heartily approve of the movement which has been started for an international celebration in 1914 or 1915, of the century of peace, but they hope that it will not be confined to Canada or the British Empire and the United States. The War of 1812 arose out of the Napoleonic struggle"—

That, perhaps, is not a correct historical statement, but we will pass that—

"and both wars came to an end in the same year. There has been a century of Anglo-French as well as American peace, and the present entente-cordiale between Great Britain and France amounts to a practical alliance for the maintenance of international stability and general peace.

"Besides, France is one of the mother countries of the Canadian people, and her millions of Canadian

descendants will more heartily join in the celebration if she takes part.

"We venture to hope, too, that so far as the United States is concerned, the celebration will consist of more than neighborly courtesies and compliments and the erection of monuments of peace. It should include something definite and practical for the purpose of securing future centuries of peace between the two countries—something that will amount to a final recognition on the part of the United States of Canada's rights to work out her own destiny on this continent as one of the great national units in the empire of nations under the British Crown. The best evidence of peaceful intentions would probably be a new treaty perpetuating as nearly as possible the terms of the Rush-Bagot convention (now terminable on six months' notice) prohibiting armaments upon the Great Lakes, such armaments being useless to the United States against any other nation but Canada."

My friends, we have got far away from the club law in most instances. Is it too much to expect that the two great English-speaking nations, composed largely of the same race and having in general the same descent, speaking the same tongue, worshipping the same God under the same forms, having practically the same institutions and having the same great aims and interests—is it too much to expect that these two nations will set the example to the world of the total abolition of this fiendish club law in international matters as well? God speed the day.

At a Peace Meeting held at the Johns Hopkins University January 6, 1910, the following resolutions were adopted:

Whereas, In the opinion of this meeting, the reduction of armaments and the cause of peace generally can in no other way be so effectively promoted as by the establishment of a permanent international court of justice, be it

Resolved, That the meeting expresses its hearty appreciation of the efforts being made by the President of the United States and by the State Department to establish such a tribunal in the form of the Court of Arbitral Justice, which was accepted in principle by the Second Hague Conference.

Whereas, In the opinion of this meeting, Maryland should lend her aid actively to the cause of peace and should at least be abreast of her sister States in this respect, be it

Resolved, That we hereby form a society, to be known as the Maryland Peace Society, and that the Chair be empowered to appoint a committee of five on organization.

In obedience to the will of the meeting, as expressed by resolution, there has been organized the Maryland Peace Society, of which you are invited to become a member.

The machinery set up in recent years for the settlement of international disputes by methods other than war, together with the actual results reached by such methods, have put upon the peace movement a practical character which it did not have a few years ago. The steps now being taken to carry out the recommendation of the Second Hague Conference relative to the establishment of a Court of Arbitral Justice are likely to result in adding to the existing machinery of peace one more institution of the greatest value to the cause of peace. In the opinion of many men it is the most important step in this direction that has thus far been taken. All the leading nations feel the burden of armaments. Nearly three-quarters of the annual revenue of the United States is expended in the maintenance of the Army and the Navy and in the payment of pensions, our legacy of past wars. An international court of justice to which disputes may be submitted before they reach an acute stage offers a workable substitute for war, and in course of time, will make it

possible to enter upon the movement for disarmament with some prospect of success.

The several forms of membership in the Maryland Peace Society are: Annual Membership, one dollar a year; Sustaining Membership, ten dollars a year; Life Membership, fifty dollars.

In addition to the literature which the Maryland Peace Society supplies, the Society holds meetings at various places in the City of Baltimore and State of Maryland at which the practicability of the cause today is shown.

Dues may be sent to Richard J. White, Treasurer, 10 South Street, Baltimore, U. S. A.

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PUBLICATIONS OF THE

MARYLAND PEACE SOCIETY

1. Judicial Proceedings as a Substitute for War or International Self Redress, by James Brown Scott. February, 1910.

2. America and the Hague Conferences, by William I. Hull. May, 1910.

3. War and Its Remedy, by Richard Bartholdt. August, 1910.

4. The Peace Move Practical, by Theodore Marburg. November, 1910.

5. The International Relations Between the United States and Canada—an Historical Sketch, by William Renwick Riddell. February, 1911.

The Third National Peace Congress will be held in Baltimore, McCoy Hall, Johns Hopkins University, May 3-5, 1911, under the joint auspices of all the leading societies in America devoted to the cause of the settlement of international disputes by means other than war. Noted men from all parts of the country will take part in the congress.